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Opinion following transfer from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES CARTER WELLS,<br><br>Defendant and Appellant. | F070212<br><br>(Super. Ct. No. F14903226)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Gregory B. Wagner, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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James Carter Wells (defendant) stands convicted of three crimes: inflicting corporal injury on a person with whom he had a dating relationship (Pen. Code, § 273.5,

subd. (a)),[1] assault with a deadly weapon (a brick) (§ 245, subd. (a)(1)), and misdemeanor vandalism (§ 594, subd. (a)(2)). The assault conviction includes a personal use enhancement (§ 12022, subd. (b)(1)). Defendant admitted suffering a prior strike and serious felony conviction in 1989 for first degree burglary and serving a prior prison term for a 2005 conviction under an earlier version of Health and Safety Code section 11377.[2]

Defendant denied an allegation concerning a 1983 conviction of second degree burglary. The trial court reviewed the record of conviction to determine whether the offense involved a residential burglary and thus qualified as a serious felony for purposes of section 667, subdivision (a). The original abstract of judgment showed a jury had found defendant guilty of first degree burglary, but the conviction was reduced to second degree burglary on appeal because the incident had not occurred at night, which was a required element in 1982, i.e., the year the crime was committed. Since multiple items in the record of conviction established the residential nature of the burglary, the trial court found the enhancement allegation to be true.

In an earlier unpublished opinion (*People v. Wells* (Sept. 26, 2016, F070212)), we affirmed the judgment in full. Defendant had argued (1) the trial court erred by allowing the jury to consider evidence of prior bad acts, (2) his constitutional rights were violated by the procedures used to determine the disputed prior serious felony conviction, and (3) the prior prison term enhancement was no longer valid because the underlying conviction had been reduced to a misdemeanor pursuant to section 1170.18.[3] The California Supreme Court has ordered us to reconsider defendant's claims in light of *People v.*

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[1] Unless otherwise specified, all undesignated statutory references are to the Penal Code.

[2] These admissions were made in response to enhancement allegations pleaded pursuant to California's three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), as well as section 667, subdivision (a), and section 667.5, subdivision (b).

[3] This statute was added to the Penal Code by the Safe Neighborhoods and Schools Act of 2014, hereafter referred to as Proposition 47.

*Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) and *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*).

The parties do not attempt to relitigate the claims regarding the prior bad acts evidence, and our analysis of those issues is unchanged. The People concede, and we agree, the holding of *Buycks* requires reversal of the prior prison term enhancement. We also accept the parties' position regarding the applicability of Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393), which went into effect after the case was transferred back to us and gives trial courts discretion to strike prior serious felony conviction enhancements.

The remaining issue is whether the 1983 burglary conviction was properly found to qualify as a serious felony under section 667, subdivision (a). The *Gallardo* opinion interprets the Sixth Amendment to the United States Constitution as severely circumscribing a trial court's ability to determine the factual basis of a prior conviction. In doing so, it overturns case law that had allowed judges to consult, and draw inferences from, a variety of materials. Specifically, trial courts may no longer rely on preliminary hearing transcripts "to determine the 'nature or basis' of [a] defendant's prior conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 137.) The Sixth Amendment is now understood to prohibit "factfinding that goes 'beyond merely identifying a prior conviction' by 'tr[ying] to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.'" (*Gallardo*, at p. 135.)

It is apparent the trial court erred by reviewing certain documents to determine the facts underlying defendant's 1983 burglary conviction, e.g., a preliminary hearing transcript and a probation report. However, it also relied on an abstract of judgment and the appellate court opinion that reduced the conviction to a second degree offense. Under *Gallardo*, *supra*, 4 Cal.5th at page 134, "a sentencing court may identify those facts it is 'sure the jury … found' in rendering its guilty verdict." In other words, it may examine the record of conviction to "identify what facts a jury necessarily found in the prior

proceeding." (*Id*. at p. 137.) The question of what exactly constitutes the "record of conviction" is unresolved, but *Gallardo* did not overrule earlier precedent, e.g., *People v. Woodell* (1998) 17 Cal.4th 448, 457, to the extent such authority holds "that appellate opinions, in general, are part of the record of conviction …."

The law in 1982 and 1983 was such that a jury verdict of first degree burglary conclusively established the residential nature of the crime. Therefore, the trial court needed only to look at the original abstract of judgment to confirm defendant had been found guilty of a serious felony. Based on our reading of *Gallardo*, reviewing the appellate court opinion to ascertain the legal basis for the postverdict reduction of the conviction to a second degree offense did not constitute prohibited judicial factfinding. Thus, the trial court's improper review of extraneous materials was harmless error. We affirm in part, reverse in part, and remand for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

Defendant and D.B. (the victim) were in a long-term romantic relationship. On April 6, 2014, they had an argument. According to the victim, defendant choked her and warned her not to "disrespect his house." When she departed from his residence in her vehicle, defendant threw a brick into the driver's side window, shattering the glass.

The victim called 911 and reported defendant had "choked [her] out" and assaulted her with a brick. Police responded to defendant's home. He waived the right to remain silent and provided his own version of the events. Defendant admitted he had been holding a brick while standing near the victim's car but claimed it had "slipped out of his hands." He denied choking the victim but admitted he had hit her in the past.

Charges related to the incident involving D.B. were tried before a jury. Defendant requested and was granted a bifurcated bench trial on the disputed prior serious felony conviction allegation. Based on the verdicts discussed above, defendant was sentenced to 15 years in prison. The sentence included consecutive five-year enhancements for each prior serious felony conviction and a one-year enhancement for the prior prison term.

## DISCUSSION

### 1. Admissibility of Prior Bad Acts Evidence

Defendant contends the trial court erred by admitting evidence of prior misconduct. The People were permitted to elicit witness testimony regarding a 2004 incident involving defendant's ex-wife and a 2007 incident involving D.B. We conclude the trial court acted within its discretion under Evidence Code sections 1101 and 1109.

#### A. 2004 Window Shattering Incident

Defendant's ex-wife testified about an incident that occurred in 2004. She and defendant had been arguing about her wanting to take their son to a park. Against defendant's wishes, she and the child got into her vehicle and began to drive away. Defendant threw an object at the car, which shattered the driver's side window. The witness opined defendant's actions had been intentional.

"Character evidence, sometimes described as evidence of a propensity or disposition to engage in a type of conduct, is generally inadmissible to prove a person's conduct on a specified occasion." (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) However, evidence of prior bad acts may be used to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, [and/or] absence of mistake or accident …." (Evid. Code, § 1101, subd. (b).) Therefore, "when a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.)

Evidence Code section 352 requires that the probative value of any proffered evidence not be "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Defendant maintains the

evidence should have been excluded under these guidelines. We review the trial court's ruling for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

At trial, defendant repeated his story about the brick accidentally slipping out of his hand and into the window of D.B.'s car. Whether his actions were intentional or accidental was a material issue with regard to the vandalism charge, which required proof of malicious damage to property. (§ 594, subd. (a)(2).) The People needed to show defendant intended to do the act that caused damage to the victim's property. (*People v. Moore* (2018) 19 Cal.App.5th 889, 894–896.) Therefore, evidence of the factually similar incident from 2004 was relevant and admissible.

Defendant argues the evidence was "too attenuated" because of the 10-year gap between the charged and uncharged offenses. He further contends "the prejudicial impact of the uncharged act was much greater than its probative value." Neither argument is persuasive.

As used in Evidence Code section 352, "undue prejudice" refers to "the tendency of evidence to evoke an emotional bias against a party because of extraneous factors unrelated to the issues." (*People v. Cortez* (2016) 63 Cal.4th 101, 128.) The statute does not prohibit "the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "Thus, evidence is subject to exclusion under Evidence Code section 352 on the basis of prejudice only '"when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction."'" (*Cortez*, at p. 128.) Furthermore, "the passage of a substantial length of time does not automatically render the prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.)

The 2004 incident was no more inflammatory than the evidence of defendant throwing a brick into D.B.'s car. If anything, the prior incident was less inflammatory

because it did not involve additional physical violence. Apart from the choking of D.B., both incidents were remarkably similar. Since the probative value of the 2004 incident was high, the trial court was within its discretion to conclude the passage of time did not outweigh the factors supporting admission under Evidence Code section 1101, subdivision (b). (See *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 205 [probative value of prior misconduct not outweighed by the fact it had occurred seven to 10 years before the charged offense].)

**B. 2007 Criminal Threats Incident**

The parties stipulated to defendant's suffering of a prior misdemeanor conviction for making criminal threats against D.B. in 2007. The victim testified to the underlying facts. Following an argument, defendant had sent her a series of voice messages. The first message said, "'You're going to be missing a family member, bitch.'" In his second message, he stated, "'I'll be over soon enough. It is about to start. Oh, yeah, it started.'" In his final message, he told her, "'Get ready, I'm coming over. Call the cops or do what you got to do, but you'll feel it, oh, I guarantee it.'"

The victim's testimony was admitted pursuant to Evidence Code section 1109, which is designed "to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.'" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 532.) The statute provides, in relevant part, "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101[, subdivision (a),] if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a).) In this context, domestic violence means "intentionally or recklessly causing or attempting to cause bodily injury, or placing

another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (§ 13700, subds. (a), (b); see Evid. Code, § 1109, subd. (d)(3).)

Defendant argues the evidence of the 2007 incident lacked probative value because his conduct was dissimilar to the charged offenses in this case. He further contends the evidence was overly inflammatory. Again, the standard of review is abuse of discretion. (*People v. Johnson*, *supra*, 185 Cal.App.4th at p. 531.)

As noted, domestic violence is broadly defined to include both physical violence and threats of bodily harm. Defendant engaged in different forms of domestic violence in 2007 and 2014, but both incidents involved the same woman. The prior incident was admissible to show defendant's propensity to mistreat this particular victim and to demonstrate the escalating nature of domestic violence, which is what the Legislature intended when it enacted Evidence Code section 1109. (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1235–1236; see *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1023–1024, 1028–1029 [evidence of prior physical abuse and death threats admissible to show defendant's propensity to commit aggravated assault against the same victim].) It was reasonable for the trial court to conclude the prior incident was less inflammatory than the acts of choking D.B. and assaulting her with a brick, especially since there was no indication defendant had followed through on the threats to harm her or her family members. Error has not been shown.

**2. Proposition 47**

On November 4, 2014, California voters approved Proposition 47, which took effect the following day. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597.) The legislation reduced to misdemeanors several drug-related offenses previously classified as felonies or wobblers (crimes punishable as either felonies or misdemeanors). (*Ibid*.) Proposition 47 also added section 1170.18, under which eligible defendants "who have already completed their felony sentences for Proposition 47 eligible offenses may petition to have

their felony convictions be 'designated as misdemeanors.' ([*Id*.], subd. (f).)" (*Buycks*, *supra*, 5 Cal.5th at p. 876, fn. 4.)

Defendant was sentenced five weeks prior to the effective date of Proposition 47. His punishment included a one-year enhancement for a prior prison term served for a 2005 conviction under former section 11377, subdivision (a) of the Health and Safety Code (felony possession of a controlled substance). In June 2015, the trial court reduced the 2005 conviction to a misdemeanor pursuant to section 1170.18. Based on the relief he obtained under Proposition 47, defendant contends his prior prison term enhancement must be stricken from the judgment.

In *Buycks*, Proposition 47 was held to "negate a previously imposed section 667.5, subdivision (b), enhancement when the underlying felony attached to that enhancement has been reduced to a misdemeanor." (*Buycks*, *supra*, 5 Cal.5th at p. 890.) Pursuant to the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, the high court also determined that section 1170.18 can apply retroactively. (*Buycks*, pp. 881–883.) Therefore, "as to nonfinal judgments containing a section 667.5, subdivision (b) one-year enhancement, … Proposition 47 and the *Estrada* rule authorize striking that enhancement if the underlying felony conviction attached to the enhancement has been reduced to a misdemeanor." (*Id*. at p. 888.)

In consideration of *Buycks*, the People appropriately concede the merits of defendant's claim. We will reverse the true finding on the prior prison term allegation and strike the corresponding punishment from the judgment. On remand, the trial court may resentence defendant based on the changed circumstances, subject to the rule that his new sentence cannot exceed the aggregate prison term originally imposed. (*Buycks*, *supra*, 5 Cal.5th at pp. 893–894; *People v. Baldwin* (2018) 30 Cal.App.5th 648, 657–658.)

### 3. Sixth Amendment Claim

Defendant argues the trial court engaged in prohibited factfinding in violation of his Sixth Amendment right to a jury trial as interpreted by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In our prior opinion, we concluded this issue was forfeited by defendant's request to have the disputed enhancement allegation determined by the trial court. However, in *Gallardo*, the California Supreme Court held that a jury waiver does not forfeit Sixth Amendment claims regarding "the limits of the [trial] court's factfinding powers." (*Gallardo*, *supra*, 4 Cal.5th at p. 127.) Accordingly, we now address the claim on the merits.

#### A. Additional Background

Defendant denied his 1983 burglary conviction qualified as a prior serious felony conviction for purposes of section 667, subdivision (a)(1). The issue in dispute was whether he had committed a residential burglary, i.e., an offense that would satisfy the current statutory definition of first degree burglary. (See further discussion, *post*.) Defense counsel argued the enhancement allegation could not be proven because, although a jury had found him guilty of first degree burglary, this appellate court reduced the conviction to a second degree offense. The People argued and proved that the disposition on appeal had nothing to do with the residential nature of the crime.

The People's evidence included the charging document in Fresno Superior Court case No. 289374-1, which was filed on December 8, 1982. Defendant was charged with violating section 459 based on the following allegation: "The said defendant, on or about October 31, 1982, did willfully and unlawfully enter the residence and building occupied by [the victim], located [at an address in Fresno], with the intent to commit larceny." An abstract of judgment showed defendant was convicted by a jury of first degree burglary on April 27, 1983, and later sentenced to the middle term of four years in prison. A minute order dated March 27, 1985, reflected a reduction of the conviction to second

degree burglary and an amended sentence of two years in prison. These documents are included in the current record on appeal.

The trial court considered the People's evidence and also took judicial notice of "the entire court file" for case No. 289374-1, which contained an unpublished appellate opinion by this court (F003625). Those items are not included in the record on appeal, but the trial court quoted from page 6 of the appellate opinion: "'The defendant does not challenge the sufficiency of the evidence to sustain his conviction of burglary. The only reason modification is required is that at the time the offense was committed, a daytime burglary was burglary of the second degree as a matter of law. This Court will therefore modify the judgment to reflect this necessary legal conclusion and remand the cause to the trial court for a probation and sentencing hearing and resentencing consistent with the modification.'"

The trial court said the appellate opinion made clear "it was a burglary of a residence during the daytime." The court also reviewed and relied upon the jury's verdict form, a preliminary hearing transcript, a probation report, and a transcript of the original sentencing hearing. Based on all of the evidence, defendant's second degree burglary conviction was found to constitute a prior serious felony conviction. The parties now dispute whether the trial court committed reversible error in reaching its conclusion.

**B. Law and Analysis**

At common law, burglary was generally defined as a felonious nighttime entry into another person's home. (*People v. Gauze* (1975) 15 Cal.3d 709, 711–712.) Over time, the definition of burglary was expanded by statute to include a variety of enclosed spaces. (See § 459.) In 1982, "'Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building committed in the nighttime …' [was] burglary of the first degree, and '[a]ll other kinds of burglary [were] of the second degree.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 770

(*Cruz*), quoting former § 460, subds. 1, 2, as amended by Stats. 1978, ch. 579, § 23, p. 1985.)

The Legislature actually eliminated the nighttime requirement from the definition of first degree burglary in 1982, but the change did not take effect until January 1, 1983. (*People v. Jackson* (1985) 37 Cal.3d 826, 830, fn. 2 (*Jackson*); *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1423.) This explains the unusual circumstances of defendant's case. He committed a burglary in October 1982 but was not tried and convicted until April 1983. He was found guilty of first degree burglary as defined by statute in 1983, but the judgment was modified on appeal because the previously required element of nighttime entry could not be proven. However, in both 1982 and 1983, all forms of first degree burglary were residential in nature. (*People v. O'Bryan* (1985) 37 Cal.3d 841, 844–845; *People v. Deay* (1987) 194 Cal.App.3d 280, 284; see *People v. Alfaro* (1986) 42 Cal.3d 627, 631, fn. 3.) Thus, by virtue of the jury's first degree verdict, defendant was necessarily found to have committed a residential burglary.

"In June 1982, the voters adopted section 1192.7(c)(18) as part of Proposition 8. That initiative enacted sections 667 and 1192.7 to provide for a sentence enhancement for repeat offenders who commit 'serious felonies' as enumerated in section 1192.7. [Citation]. Although most of the 'serious felonies' listed in section 1192.7 referred to specific, defined criminal offenses, section 1192.7(c)(18), as originally enacted by the electorate, did not. Rather, as enacted, it listed as a serious felony 'burglary of a residence,' a term [that] '[did] not correspond precisely to the elements of any then-existing criminal offense.'" (*Cruz*, *supra*, 13 Cal.4th at p. 772.) Section 1192.7 was subsequently amended to match the definition of first degree burglary, and now it simply refers to "any burglary of the first degree." (*Id*., subd. (c)(18); see *Cruz*, at p. 773.)

Section 667 provides for a five-year sentencing enhancement upon proof of a prior conviction of "a serious felony listed in subdivision (c) of Section 1192.7." (§ 667, subd. (a)(1), (4).) Section 1192.7, subdivision (c), has always been construed "'as referring not

to specific criminal offenses, but to the criminal conduct described therein.'" (*Cruz, supra,* 13 Cal.4th at p. 773, quoting *Jackson, supra,* 37 Cal.3d at p. 832.) This means defendant's 1983 conviction is subject to the enhancement if it was based on conduct satisfying the current definition of first degree burglary, i.e., residential burglary.[4] (*People v. Garrett, supra,* 92 Cal.App.4th at pp. 1421–1423, 1431–1432; see *Cruz, supra,* at pp. 775–776 ["the distinction between first and second degree burglary is founded upon the perceived danger of violence and personal injury that is involved when a residence is invaded"].) The People made the requisite showing below, but the issue before us is whether the trial court was capable of finding the enhancement allegation true without violating defendant's Sixth Amendment rights.

The scope of a trial court's authority to determine section 667 enhancement allegations has been a topic of controversy for over 30 years. In *Jackson,* which was decided in 1985, the California Supreme Court repeated two principles it had articulated in *People v. Crowson* (1983) 33 Cal.3d 623: "(1) … proof of a prior conviction establishes only the minimum elements of the crime, even if the charging pleading contained additional, superfluous allegations; and (2) … the prosecution cannot go behind the record of the conviction and relitigate the circumstances of the offense to prove some fact which was not an element of the crime." (*Jackson, supra,* 37 Cal.3d at p. 834.) Thus, although a second degree burglary conviction can qualify as a prior serious felony under section 667, "proof of the residential character of the burglary encounters obstacles." (*Jackson,* at p. 836.)

The high court observed that unless a defendant admitted the allegation, it would be extremely difficult to prove the residential nature of a second degree burglary

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[4]Since 1992, first degree burglary has been defined as "[e]very burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building …." (§ 460, subd. (a), as amended by Stats. 1991, ch. 942, § 15.)

conviction that "antedated the enactment of Proposition 8," i.e., section 667. (*Jackson, supra*, 37 Cal.3d at pp. 833, 834–836.) "The record of a conviction for second degree burglary would not prove entry into a residence, even if the pleadings included superfluous allegations to that effect. [Citation.] Moreover, the People could not go behind that record to prove a fact which was not then an element of the crime." (*Id*. at p. 836.) However, in cases prosecuted *after* the enactment of section 667, "an allegation that a burglary involved entry into a residence is not a superfluous allegation" because "proof of the residential character of the burglary would expose defendant to an enhanced punishment if he committed a later serious crime." (*Jackson*, at p. 836, fn. 14.) "Consequently, admissions or findings that a burglary was of a residence, established on the record of the conviction, could be used in a later proceeding to prove that the defendant had previously been convicted of a serious felony." (*Ibid*.)

In *People v. Alfaro, supra*, 42 Cal.3d at page 636, the California Supreme Court said the "'record of the conviction' refers to the judgment, and matters necessarily adjudicated therein." Excluded from this definition are "such documents as probation reports and preliminary hearing transcripts." (*Ibid*.) The opinion condemned reviewing "the record in the court file" for evidence supporting elements not "necessarily adjudicated by the conviction." (*Id*. at pp. 635, 636.) Stated differently, "proof of the prior conviction is limited to matters which fall within the doctrine of collateral estoppel and thus cannot be controverted." (*Id*. at p. 634.)

The *Alfaro* holding was expressly overruled in *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*). Under *Guerrero*, a trial court "may look to the entire record of the conviction," as opposed to "matters necessarily established by the prior judgment of conviction," to determine the truth of a prior serious felony enhancement allegation. (*Id*. at pp. 348, 352–356.) In a brief dissent, Justice Broussard opined there was no need to revisit the analyses of *Jackson* and *Alfaro* because those cases, as well as *Guerrero* itself,

were relevant "only to convictions antedating the enacting of section 667 in 1982, since after that date allegations of residential entry are not surplusage." (*Guerrero*, at p. 361.)

The *Guerrero* court declined "to resolve such questions as what items in the record of conviction are admissible and for what purpose." (*Guerrero, supra*, 44 Cal.3d at p. 356, fn. 1.) In *People v. Reed* (1996) 13 Cal.4th 217, two possible definitions of the "record of conviction" were considered: the term could be "used technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*Id*. at p. 223.) Without adopting either construction, the court concluded preliminary hearing transcripts fell "within even the narrower definition." (*Ibid.*)

In *People v. Woodell*, *supra*, 17 Cal.4th 448, appellate court opinions were held to be "part of the record of conviction that the trier of fact may consider in determining whether a conviction qualifies under the sentencing scheme at issue." (*Id*. at p. 457.) However, "[w]hether and to what extent an opinion is probative in a specific case must be decided on the facts of that case." (*Ibid*.) This holding was reiterated in *People v. Trujillo* (2006) 40 Cal.4th 165, which separately concluded that statements attributed to a defendant in a probation report are not part of the record of conviction. (*Id*. at pp. 179–181.)

As the *Guerrero* line of authority enlarged the boundaries of judicial factfinding in the context of enhancement allegations, the United States Supreme Court's Sixth Amendment jurisprudence moved in a different direction. The first of those decisions was *Apprendi*, which holds, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury …." (*Apprendi, supra*, 530 U.S. at p. 490.) Six years later, in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), our state Supreme Court determined "that *Apprendi* does not preclude a court from making sentencing determinations related to a

defendant's recidivism." (*Id*. at p. 707.) In addition to this holding, the opinion essentially reaffirmed *Guerrero* and its progeny. (See *McGee*, at pp. 694, 706.)

Two subsequent federal Supreme Court cases, *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 579 U.S. __ [136 S.Ct. 2243] (*Mathis*), conflicted with portions of *McGee*. In particular, *McGee* had held that "[i]f the enumeration of the elements of the offense does not resolve the issue [of whether the defendant suffered a qualifying conviction], an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction *realistically may have been based* on conduct that would not constitute a serious felony under California law." (*McGee*, *supra*, 38 Cal.4th at p. 706, italics added.) The *Descamps* opinion, in contrast, disapproved of allowing a sentencing court "to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct" because "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." (*Descamps*, at p. 269.)

The *Mathis* decision explains the relevant constitutional principles in a similar fashion:

> "[O]nly a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. [Citation.] That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. [Citations.] He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.' [Citations.] He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (*Mathis*, *supra*, 579 U.S. at p. __ [136 S.Ct. at p. 2252].)

In *McGee*, the California Supreme Court condoned a trial court's review of preliminary hearing transcripts from two Nevada cases to determine whether the

defendant's prior robbery convictions qualified as strikes under California's three strikes law. (*McGee*, *supra*, 38 Cal.4th at pp. 687–689, 707.) In *Gallardo*, the legality of that procedure was reevaluated. The issue in *Gallardo* arose from a trial court's reliance on a preliminary hearing transcript to determine, for enhancement purposes, the factual basis of an aggravated assault conviction under a pre-2012 version of section 245.[5] (*Gallardo*, *supra*, 4 Cal.5th at p. 123.)

The *Gallardo* decision upholds *McGee* to the extent it "instructs that determinations about the nature of prior convictions are to be made by the court, rather than a jury, based on the record of conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) However, *McGee* was overruled "insofar as it authorizes trial courts to make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction." (*Gallardo*, at p. 134.) The use of a preliminary hearing transcript to infer factual circumstances underlying a prior conviction is thus prohibited. (*Id*. at pp. 136–137.) Whereas "[a]n indictment or jury instructions might help identify what facts a jury necessarily found in the prior proceeding," a preliminary hearing transcript "can reveal no such thing." (*Id*. at p. 137.)

The California Supreme Court noted "the holdings of *Descamps* and *Mathis* both concern the proper interpretation of a federal statute" (*Gallardo*, *supra*, 4 Cal.5th at p. 124) and "did not squarely overrule existing California law" (*id*. at p. 128). Those cases "did not hold that the Sixth Amendment … forbids application of the so-called modified categorical approach" to determining the nature of a prior conviction for enhancement purposes (*id.* at pp. 134–135), i.e., allowing trial courts "to review materials such as

[5]In 2012, section 245 was amended "to separate the prohibitions against assault 'with a deadly weapon' and assault 'by any means of force likely to produce great bodily injury' into different subdivisions." (*Gallardo*, *supra*, 4 Cal.5th at p. 125, fn. 1.) In earlier versions of the statute, subdivision (a)(1) had referenced both forms of the offense and thus contained alternative elements. A conviction under current and former versions of section 245 qualifies as a strike "if the assault was committed with a deadly weapon, but not otherwise." (*Gallardo*, at p. 123; see § 1192.7, subd. (c)(23).)

charging documents, jury instructions, and any agreed-to factual basis for a guilty plea" to determine what facts were necessarily found or admitted in the prior proceeding. (*Id*. at p. 131; see *id.* at pp. 137–138.) However, the justices in *Gallardo* agreed with the federal Supreme Court's discussion of relevant Sixth Amendment principles and chose to "follow the court's guidance" in that regard. (*Gallardo*, at p. 135.)

The holding of *Gallardo* is repeated in different ways throughout the opinion. These are some examples: "While a sentencing court is *permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict* …, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo, supra*, 4 Cal.5th at p. 124, italics added.) "The trial court's role is limited to determining the facts that were necessarily found in the course of entering the conviction." (*Id*. at p. 134.) "The court's role is … limited to identifying those facts that were established by virtue of the conviction itself—that is, *facts the jury was necessarily required to find to render a guilty verdict*, or that the defendant admitted as the factual basis for a guilty plea." (*Id*. at p. 136, italics added.) "[Q]uestions about the proper characterization of a prior conviction are for a court to resolve, based on its evaluation of *the facts necessarily encompassed by the guilty verdict* or admitted by the defendant in pleading guilty to the prior crime." (*Id*. at p. 139, fn. 6, italics added.)

Here, the People argue any error committed by the trial court in reviewing materials such as the preliminary hearing transcript and probation report was harmless. We agree. The enhancement allegation was conclusively established by two items in the record of conviction: the original abstract of judgment and the subsequent appellate court opinion. These documents identify the facts necessarily found by the jury in the prior case.

The abstract of judgment shows the jury found defendant guilty of first degree burglary. We have already explained that during the relevant time period, all first degree

burglaries were residential in nature as a matter of law. (*People v. O'Bryan*, *supra*, 37 Cal.3d at pp. 844–845; *People v. Deay*, *supra*, 194 Cal.App.3d at p. 284.) First degree burglary could then be committed only by burglarizing an inhabited dwelling, trailer coach, or building, and all three forms of the offense still qualify as first degree burglary under the current version of section 460. Therefore, the jury in case No. 289374-1 necessarily found defendant guilty of a serious felony within the meaning of section 667, subdivision (a) and 1192.7, subdivision (c)(18).

As explained in *People v. Delgado* (2008) 43 Cal.4th 1059 (*Delgado*), an abstract of judgment is an "officially prepared clerical *record* of the conviction and sentence." (*Id*. at p. 1070.) In the absence of rebuttal evidence, an "officially prepared abstract of judgment that clearly describes the nature of the prior conviction" is presumed reliable and accurate. (*Id*. at pp. 1070–1071.) If the abstract describes a serious felony offense within the meaning of section 667, subdivision (a)(1), it constitutes prima facie evidence that a qualifying conviction occurred. (*Delgado*, at pp. 1066, 1070.)

The *Delgado* opinion further explains, "[A]n accusatory pleading may specify that a charged offense involves facts making the offense a serious felony. The serious felony issue will then be tried unless the defendant separately admits it as part of a guilty plea. (§ 969f.) By this means as well, the serious felony nature of the offense will become an explicit part of the record of conviction, leaving no room for confusion if and when the issue becomes relevant to the sentence for a subsequent felony." (*Delgado*, *supra*, 43 Cal.4th at p. 1072.)

Since defendant was prosecuted for burglary after the enactment of section 667, the allegations in the charging document regarding the residential nature of the crime are not superfluous even though the degree of the offense was not explicitly alleged. (*Jackson*, *supra*, 37 Cal.3d at p. 836, fn. 14.) Because *Gallardo* expressly permits the use of charging documents to determine the truth of section 667 enhancement allegations, the information filed in case No. 289374-1 further confirmed the findings inherent in the

jury's verdict.[6] (*Gallardo*, *supra*, 4 Cal.5th at p. 137 ["An indictment or jury instructions might help identify what facts a jury necessarily found in the prior proceeding"].)

Like abstracts of judgment, an appellate court opinion is part of the "record of conviction" for purposes of a sentencing enhancement inquiry. (*People v. Trujillo*, *supra*, 40 Cal.4th at pp. 180–181; *People v. Woodell*, *supra*, 17 Cal.4th at p. 457.) Whatever limitations *Gallardo* may place on the use of appellate opinions to determine the facts underlying a prior conviction, it does not prohibit a trial court from reviewing an appellate opinion to determine the *legal* basis for a modification of the judgment. In this instance, the appellate opinion explained how and why the jury's verdict of first degree burglary, which necessarily entailed a finding of residential burglary, was successfully challenged on appeal. No judicial factfinding was required "to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict." (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) Therefore, the trial court's procedural errors were harmless beyond a reasonable doubt.

**4. Senate Bill 1393**

On September 30, 2018, the Governor approved Senate Bill 1393, which amended sections 667 and 1385. The legislation went into effect on January 1, 2019. (Stats. 2018, ch. 1013, §§ 1–2.) As a result, trial courts now have discretion under section 1385 to strike or dismiss the five-year sentencing enhancement prescribed by section 667 for prior serious felony convictions.

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[6]The nature of the crime and the trial court's reliance on documents such as the information and verdict form, plus various other circumstances, distinguish this case from *People v. Hudson* (2018) 28 Cal.App.5th 196, which questioned *Delgado* and the reliability of an abstract of judgment indicating the defendant had pleaded guilty to "Assault w/ deadly weapon" in violation of former section 245, subdivision (a)(1). (*Hudson*, *supra*, at pp. 208–210; see *id.* at p. 210 [concluding "the abstract may reflect the court's own interpretation and factfinding of the available evidence"].)

The parties agree Senate Bill 1393 applies retroactively to nonfinal judgments and remand is appropriate. Absent evidence to the contrary, it is presumed the Legislature intended statutory amendments reducing the punishment for a crime to apply retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada, supra*, 63 Cal.2d at p. 745.) Consistent with the case law on this issue, we accept the parties' position. (E.g., *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) On remand, the trial court shall consider whether to exercise its discretion to strike one or both of defendant's prior serious felony conviction enhancements.

**DISPOSITION**

The finding of a prior prison term within the meaning of section 667.5, subdivision (b), is reversed. Defendant's sentence is vacated and the matter remanded for resentencing. On remand, the trial court shall determine whether one or both of defendant's prior serious felony conviction enhancements should be stricken in accordance with sections 667, subdivision (a), and 1385, subdivision (b). In all other respects, the judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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DETJEN, J.